Supreme Court, U.S.
FILED

961523 MAR 20 1997

OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

WILLIAM E. FOSTER
Petitioner

v.

CITY OF SOUTHFIELD, a municipal corporation, JANET TOBIN, Personal Representative of the Estate of ROLLIN G. TOBIN, Deceased, and ROBERT BLOCK,

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL L. PITT
Counsel of Record

PITT, DOWTY & McGEHEE, P.C.
306 S. Washington
Suite 212
Royal Oak, Michigan 48067
(810) 398-9800

Attorney for Petitioner

ROBIN H. KYLE
Counsel of Record

615 Griswold
Suite 510
Detroit, Michigan 48226
(313) 961-3975

Attorney for Petitioner

28 pp

QUESTION PRESENTED

Whether the Court of Appeals, in a First Amendment retaliatory discharge case, erred in holding that an employer may sustain its burden of proving the disruptive effects of its employee's speech solely on the basis of its subjective opinion.

PARTIES TO THE PROCEEDINGS

The Petitioner is William E. Foster. The Respondents are City of Southfield, Janet Tobin, Personal Representative of the Estate of Rollin G. Tobin, deceased, and Robert Block.

TABLE OF CONTENTS

page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 16

APPENDIX 1a

DECISION OF THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT, DECIDED AND FILED DECEMBER 20, 1996 ...

TABLE OF AUTHORITIES

Andersen v. McCotter
100 F.3d 723 (10th Cir. 1996) 14

Bose Corp. v. Consumers Union of United States, Inc.
466 U.S. 485 (1984) 15

Campbell v. Towse
992 F.3d 820 (Th Cir. 1996) 13

Connick v. Meyers
461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed2d 708 (1983) 8-9

Jeffries v. Harelston
52 F.3d 9 (2nd Cir. 1995) 11-12

Moore v. City of Wynnewood
57 F.3d 924 (10th Cir. 1995) 12

Waters v. Churchill
511 U.S. 661,114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) 7-16

Watters v. City of Philadelphia,
55 F.3d 886 (3rd Cir, 1995) 15

Wright v. Illinois Department of Children & Family Services
40 F.3d 1492 (7th Cir. 1994) 10

Petitioner, William E. Foster, petitions as follows for a Writ of Certiorari to review the December 20, 1996 Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed the judgment entered by the United States District Court for the Eastern District of Michigan on August 9, 1994.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit entered on December 20, 1996, is an unpublished Opinion. The pertinent portions of the Opinion are made part of the Appendix.

JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Sixth Circuit on December 20, 1996.

William E. Foster seeks to invoke the jurisdiction of the Court t to review the Opinion of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1)

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. §1983

Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Procedural Posture:

This Petition for Writ of Certiorari ("Petition") arises from the complaint filed by Plaintiff-Respondent William E. Foster (hereinafter "Foster") on September 30, 1992, in the United States District Court for the Eastern District of Michigan, alleging a retaliatory discharge claim against his former employer, defendant City of Southfield Fire Department (hereinafter "SFD"), its public safety director, Rollin G. Tobin, and city manager, Robert Block.

The complaint alleged that Foster was terminated on September 8, 1992, because he spoke to the media on the subject of racism and sexism within the SFD. Foster alleged that his speech was protected and that the termination was in violation of his rights as protected under the First Amendment of the United States Constitution. (R.1)

Trial in the matter commenced on July 12, 1994. After twelve days of trial, the jury determined that Foster was terminated because of his speech activities but found that the employer SFD had sustained its burden of proving that plaintiff's speech was disruptive to its operations. Judgment dismissing the case was entered on August 9, 1994. (R. 202) Foster's motion for new trial was denied on December 1, 1994. (R.211) On December 27, 1995, Foster filed a timely notice of appeal from the district

court's judgment dismissing his case. (R.215)

On December 20, 1996, the United States Court of Appeals for the Sixth Circuit announced its decision affirming the judgment of the United States District Court for the Eastern District of Michigan. (Appendix)

B. Facts:

Foster was hired by defendant city in April of 1990, to serve as a public safety reserve coordinator for the SFD. In this job, Foster was responsible for promoting the cadet and reserve programs affiliated with the SFD, and for recruiting qualified minorities and women to join the program. Immediately prior to the hiring of William Foster as its public safety reserve coordinator, the SFD consisted of approximately 105 permanent members, all of whom were white males. Management of the city recognized that recruitment through the testing and selection procedures set forth through the civil service procedures was preventing the desired diversification of its fire department. Mr. Foster was hired to help diversify the department. (Opinion, 2; appendix)

In 1991, the city hired several African-Americans and females as cadets and probationary firefighters. As a result of this diversification, Foster claimed that some of the white male firefighters did not respond well to the new working environment and created a hostile environment for the minorities and women. (Opinion, 2)

In January of 1992, Foster gave a deposition in a state civil-rights suit

brought against the city by female probationary firefighter, Mary Potts. In his deposition, Foster described several instances of racism within the fire department. In March of 1992, plaintiff was interviewed by a local television reporter and stated, on the air, that the SFD was sexist and racist. (Opinion, 3)

After the television news report took place, plaintiff Foster agreed to speak with a newspaper reporter. Foster was quoted as saying that the SFD was ignoring racism at the SFD and that the city's minority hiring plan was a "sham". (Opinion, 3)

On March 23, 1992, Foster wrote a letter to the city administrator, defendant Robert Block, in which he accused the city of being a "do nothing" administration. He also complained that the cadets had become "engine house janitors". He sent a copy of the letter to the media. (Opinion, 3)

On April 29, 1992, public safety director Tobin sent Foster a letter of reprimand criticizing him for his comments to the media. The letter stated that Foster's public statements had compromised his ability to perform his job duties and to act as a representative of the city. (Opinion, 3)

On August 27, 1992, plaintiff filed a state civil-rights action in circuit court. On that day, Foster held a press conference at city hall. He stated that racism existed at the SFD and he did not believe that the SFD wanted to recruit any more minorities. (Opinion, 3)

On September 8, 1992, the city terminated Foster's employment.

Plaintiff Foster commenced this action in the United States District Court claiming that he was terminated in retaliation for engaging in protected First-Amendment speech and, therefore, his termination violated 42 U.S.C. §1983. (Opinion, 3)

At the trial of the matter, the district court determined that plaintiff's speech dealt with the matter of public concern and was, therefore, presumptively protected.

Two questions were submitted to the jury for resolution. First, the jury was asked to consider whether plaintiff's termination was caused by his speech activities. The second question dealt with whether the defendant SFD had satisfied its burden of proof demonstrating that Foster's speech activities were disruptive to the fire department's operations. (R.201)

The jury returned a verdict in favor of Foster on the first question but, determined, in its verdict, that the defendant SFD had met its burden of proof on the issue of whether plaintiff's public speech was disruptive.

The instructions given to the jury by the court were as follows:

> **"Now, the speech as such, of plaintiff, was on matters of public concern. If the speech of plaintiff interfered with the effectiveness of the City of Southfield's operations, or interfered with the performance of plaintiff's job duties, then it was -- it is not protected speech.**
>
> **"In proving its assertion that plaintiff's speech disabled him from performing his job duties, the City, the defendant, must prove by**

> **a preponderance of the evidence that the plaintiff's statements interfered with the effectiveness of the City of Southfield's operations, or in the performance of plaintiff's job.**
>
> **"As to plaintiff's first claim, since his speech dealt with matters of public concern, defendant has the burden of proving, by a preponderance of the evidence, that his speech interfered with the effectiveness of its operations, or interfered with the performance of plaintiff's job."** (Opinion, 5)

Plaintiff objected to the instruction given to the jury contending that the instructions improperly permitted defendants to defeat Foster's First-Amendment claim solely on the basis of the city's opinion and conjecture as to the disruption caused by Foster's speech. Plaintiff's proposed jury instructions, rejected by the trial court, provided in part:

> **"In meeting its burden of proof on this issue, defendant must submit substantial evidence that plaintiff's statements interfered with the effectiveness of defendant's operation or in the performance of his job.**
>
> **"Defendant must establish this point with a showing of actual and significant harm objectively determined.**
>
> **"Mere fear or apprehension of a disturbance is not enough to justify denial of the freedom of expression.**
>
> **"In order to sustain its burden, defendant must have shown sufficient facts upon which it could have reasonably forecast disruption."** (R.203)

The Sixth Circuit Court of Appeals, in affirming the trial court, relied exclusively on *Waters v. Churchill*, 511 U.S. 661,114 S.Ct. 1878, 128 L.Ed.2d 686 (1994)

The Court of Appeals, in affirming the district court judgment, stated:

> **"We hold, therefore, that the jury was entitled to consider defendants' opinions as to the disruptive effect of plaintiff's speech. Such opinions are relevant and could legitimately form the basis for the jury's verdict. The evidence presented by defendants was sufficient to support a finding that plaintiff's statements interfered with his ability to perform his job. We find no error."**

ARGUMENT

THIS PETITION SHOULD BE GRANTED SO THAT THIS COURT CAN REVISIT THE *WATERS* DECISION WHICH HAS BEEN INTERPRETED BY THE SIXTH CIRCUIT, AND OTHER COURTS, TO STAND FOR THE PROPOSITION THAT THE PROTECTED NATURE OF A PUBLIC EMPLOYEE'S SPEECH IS SOLELY DEPENDENT ON THE EMPLOYER'S SUBJECTIVE REACTION TO IT.

In *Waters v. Churchill*, 511 U.S. 661,114 S.Ct. 1878, 128 L.Ed2d 686 (1994), plaintiff, Ms. Churchill, claimed that she had criticized certain substantive training policies of the hospital and, therefor, her speech was protected. Her supervisor, Ms. Waters, claimed that other employees had overheard Ms. Churchill's conversation indicating that plaintiff had made sharp personal criticisms of Waters and, therefore, said Ms. Churchill's speech was not protected.

The Seventh Circuit Court of Appeals said that the inquiry must turn on what her speech actually was, as determined by the jury, not on what the employer thought it was. *Churchill v. Waters*, 977 F.2d 1114 (7th Cir. 1992);*Waters*, 511 U.S. at 694, 114 S.Ct. at 1880.

In reversing the Seventh Circuit, Justice O'Connor's plurality opinion observed that the dispute centered on the factual basis for applying the test set forth in *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed2d 708 (1983) The *Connick* test was described by this court in *Waters* as:

> **"What the speech is, in what tone it was delivered, what the listeners' reactions were - is determined. Should the court apply the Connick test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself?"** *Waters*, 511 U.S. 701, 114 S.Ct. at 1884.

The Seventh Circuit's approach, which was rejected by this court, held that the employer's factual conclusions were irrelevant; the jury should engage in its own fact finding. The petitioners in *Waters* contended that the employer's factual conclusions should determine the outcome of the case. Justice O'Connor observed that a "middle course" would mean that the court should "accept the employer's factual conclusions, but only if those conclusions were arrived at reasonably". *Waters*, 511 U.S. 701; 114 S.Ct. at 1884

Justice O'Connor explained that because a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters, the government employer may have to "make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." Id. at 1887

Although this court's opinion in *Waters* split into four opinions, Justice Souters' concurring opinion clarified the decision's meaning in pointing out that "though Justice O'Connor's opinion speaks for just four members of the court, the reasonableness test it sets out is clearly the one that lower courts

should apply." *Waters*, 511 U.S. at 705-706,114 S.Ct. at 1893 (Souter, J., concurring)

Several cases interpreting *Waters*, since it was decided in 1994, illustrate the dangers inherent in the reasonableness test adopted by this court in *Waters*.

In *Wright v. Illinois Department of Children & Family Services*, 40 F.3d 1492 (7th Cir. 1994) Wright alleged that defendant took disciplinary action against her in retaliation for her exercising First Amendment rights. Plaintiff, who worked for the Illinois Department of Children & Family Services, had a different and conflicting opinion as to how a case of reported child abuse should be investigated. Over the course of several months, this conflict degenerated into open hostility - characterized by plaintiff's accusing her supervisors of neglecting abused children and violating state law. The supervisors accused the plaintiff of perjury and insubordination. Eventually, the department imposed various disciplinary measures on Wright which resulting in litigation.

During a court hearing involving allegations of child abuse, Wright was called to testify as a witness for the department. Wright's testimony was critical of the department's investigation of the case and also criticized one of her supervisors. Wright was suspended for (30) days because she had repeatedly provided inaccurate or misleading information to the court in her testimony.

In sustaining the District Court's dismissal of Wright's First Amendment claim, the Court of Appeals concluded that plaintiff's employers could punish her for providing truthful testimony that criticized the employer, if they reasonably believed the testimony was false. Id, at 1506.

The Court of Appeals went on to state in a footnote, also citing *Waters*, supra, that the "protected nature of the speech hinges not on it's objective characterization but on the employers subjective reaction to it." Id, at 1506 n.5

The Second Circuit Court of Appeals was required to reconsider it's decision in a First Amendment case involving public speech by a university professor. *Jeffries v. Harelston*, 52 F.3d 9 (2nd Cir. 1995) involved public statements by the Chairman of the Black Studies Department at the City College of New York. Jeffries, the Chairman of the Department, made a public speech in which he addressed the bias of the New York Public School Curriculum and the history of black oppression in public schools. Jeffries also made several derogatory statements concerning Jews. As a result of this public speech, Jeffries term was limited to one year as a professor as opposed to the usual three years. The Court of Appeals originally concluded that Jeffries First Amendment rights had been violated, but was ordered by this court to reconsider it's decision in light of *Waters*.

On remand the Court of Appeals held that the defendant University did not violate Jeffries' First Amendment rights when it disciplined him for

speech that they reasonably believed would disrupt it's University operations. 52 F.3d at 9 The Court of Appeals concluded that *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if; (1) the employers prediction of disruption is reasonable; (2) the potential disruptiveness is enough to out weigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech. Id. at 11, 13.

Even though the jury in *Jeffries* specifically found that Jeffries was demoted because of his speech and the jury specifically found that the speech did not disrupt "the effective and efficient operation of the Black Studies Department, the college or the university," the court concluded, as a matter of law, that the speech was not protected because "the defendants were motivated by a reasonable prediction of disruption". Id, at 11, 13.

In *Moore v. City of Wynnewood*, 57 Fd3 924 (10th Cir. 1995). Moore was demoted from his position as deputy chief of police. He alleged that this demotion was in retaliation of his exercise of his First Amendment rights. Moore had spoken, while on duty and in uniform, at a City Council Meeting regarding a recent incident involving two police officers of the Wynnewood Police Department. At the council meeting, Moore stated that the officers involved had followed department procedures. However, Moore also stated that the incident was the culmination of prior problems created by a particular officer.

Although the Court of Appeals concluded that Moore's speech was of a matter of public concern, the court ruled that the speech was unprotected under the First Amendment. The court said that balanced against the importance of Moore's speech are powerful governmental concerns that support the city's ability to take disciplinary measures in response to Moore's speech. Id, at 933. The court reasoned that Moore's statements threatened both the department's morale and its chain of command.

In *Campbell v. Towse,* 992 Fd3 820 (7th Cir. 1996), Campbell was a police officer who wrote a letter to the Chief of Police indicating that he disagreed with the management style and law enforcement philosophy of the department as administered by Chief Jones. Officer Campbell indicated in the letter that he had grave doubts about the wisdom of Chief Jones' decision to institute a Community Policing Program. He further indicated that he objected because he believed that the needs of the non-minority residents of the City of Alton were being slighted.

Citing *Waters*, the *Campbell* Court of Appeals concluded that Chief Jones' interest in maintaining authority over departmental personnel and in being assured that his commands would be respected by Officer Campbell, clearly out weighed Campbell's interest in expressing his views. Id, at 829. The Seventh Circuit decision also concluded that it was reasonable for Chief Jones to loose confidence in officer Campbell and to begin to doubt Campbell's loyalty and/or to conclude that the memorandum was not merely

an expression of philosophical disagreement. In the court's view, the memorandum indicated a significant reluctance on Campbell's part to accept Jones' leadership of the department. Id.at 829.

Some courts have, while paying lip service to *Waters*, clearly ignored the substance of it's holdings. In *Andersen v. McCotter*, 100 F.3d 723 (10th Cir. 1996), plaintiff Andersen was an Intern for the Board of Pardons. In February of 1994, Andersen was interviewed by the TV News and she publicly criticized proposed board changes, expressing her concern that the changes could result in the premature release of potentially dangerous sex offenders. Andersen was fired the following day for violating a written policy that prohibited employees from speaking to the media without prior authorization. Defendant claimed Andersen's speech was unprotected because it undermined the public's confidence in the Department of Corrections.

The *Andersen* court concluded that defendant put forth no evidence to support the District Court's finding that the public criticism undermined public confidence in the Department of Corrections. The court also found there was no evidence that Andersen's non-compliance with the written policy regarding speaking to the public without prior authorization "interfered with the regular operations of the Department of Corrections". Therefore, the court concluded that the District Court judgment in favor of the defendant employer had to be reversed.

The Third Circuit Court of Appeals has applied *Waters* in a similar fashion. *Watters v. City of Philadelphia*, 55 F.3d 886 (3rd Cir, 1995)

It is interesting that both *Andersen* and *Watters*, while acknowledging *Waters*, ignored its holding by requiring the employer make a substantial evidentiary showing that the speech adversely effects the efficiency or effectiveness of it's operations. Id. at 727.

This court has described the responsibility of the judiciary when dealing with First Amendment cases:

> **"In cases raising First Amendment issues, we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'judgment does not constitute a forbidden intrusion on the field of free expression'."**
> *Bose Corp. v. Consumers Union of United States, Inc.* 466 U.S. 485, 499 (1984)

The immediate and far reaching result of the *Waters* decision is clear: this court has essentially turned over to government employers the sole authority to determine which speech it will tolerate in the workplace. As this case demonstrates, a government employer has the ability to curb their employee's speech, even on matters of public concern, through the mere expression of an opinion that the otherwise protected speech may be disruptive to the efficient operation of the government enterprise.

Waters has spawned a dangerous rule: whether a public employee's speech is protected is now determined, for the most part, solely by the

employer's subjective reaction to the speech. The interpretations of *Waters*, as expressed by the Second, Sixth, Seventh, and Tenth Circuits Court of Appeals proves that "reasonable investigation" safeguard envisioned by this court is not working. Government officials, who are often the target for the public criticism, now determine, with only minimal limitation, which speech will or will not be tolerated in the workplace.

CONCLUSION

In reality, *Waters* represents the beginning of an era of overriding restriction on public employees' First Amendment rights in the government workplace. There is a real danger that, if left unechecked, the right of a public employee to engage in protected speech will soon be a historical artifact.

The case presented to the court today represents an opportunity to revisit *Waters* and fully restore the rule of law to free-speech activities in places of public employment before it is gone completely.

It is respectfully requested that this court grant petitioner's writ or certiorari.

By: _____

MICHAEL L. PITT P-24429
PITT, DOWTY & McGEHEE, P.C.
Attorney for Petitioner
306 S. Washington, Ste. 212
Royal Oak, MI 48067
(810) 398-9800

ROBIN H. KYLE P-33330
Attorney for Petitioner
615 Griswold
Suite 510
Detroit, MI 48226
(313) 961-3975

DATED: March 20, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM E. FOSTER,

Plaintiff-Appellant
and Cross Appellee

Nos. 95-1032/1072[1]

On Appeal from the
United States District
Court for the Eastern
District of Michigan

CITY OF SOUTHFIELD, a
municipal corporation,
JANET TOBIN, Personal
Representative of the
Estate of ROLLIN G. TOBIN,
Deceased, and ROBERT BLOCK,
its agents, officers and employees,
jointly and severally,

Defendants-Appellees
and Cross Appellants.

WILLIAM E. FOSTER,

Plaintiff-Appellee

No. 1526*

On Appeal from the
United States District
Court for the Eastern
District of Michigan

CITY OF SOUTHFIELD, a
municipal corporation,
JANET TOBIN, Personal
Representative of the
Estate of ROLLIN G. TOBIN,
Deceased, and ROBERT BLOCK,
its agents, officers and employees,
jointly and severally,

Defendants-Appellees

---

[1] These appeals were consolidated for argument.

Nos. 95-1032/1072/1526

BEFORE: KENNEDY, JONES and BOGGS, Circuit Judges;

PER CURIAM: Plaintiff William Foster brought this action against his former employer, defendant, City of Southfield ("City"), and two of its employees, defendants Rollin Tobin and Robert Block, claiming that he was wrongfully terminated in retaliation for his exercise of his First Amendment rights and for engaging in activity protected under the Michigan Whistleblowers' Protection Act ("WPA") and Elliott-Larsen Civil Rights Act ("ELCRA"). A jury found in favor of defendants. Plaintiff appeals, claiming that the District Court gave erroneous instructions, inappropriately restricted the scope of plaintiff's case, and erroneously dismissed his WPA claim. Defendants cross-appeal, claiming that the District Court abused its discretion in assessing attorney fees and costs as a sanction against defendants for discovery misconduct. Defendant also appeal the award of attorney fees as a sanction for statements made by defense counsel that prompted the District Court to declare a mistrial.

I. Facts

Plaintiff was hired by defendant City in April of 1990 to serve as a Public Safety Reserve Coordinator for the Southfield Fire Department ("SFD"). Plaintiff, who is African-American, was responsible for promoting the cadet and reserve programs affiliated with the SFD, and for recruiting qualified minorities and women to join the programs.

Although defendant City claims that it had long sought to diversify the SFD, there were no women or minorities among the permanent members of the SFD, there were no women or minorities among the permanent members of the SFD at the time plaintiff was hired. Following the hiring of plaintiff, the City hired several African-Americans and females as cadets and probationary firefighters. Plaintiff contends that some of the white malo firefighters did not respond well to the newly diversified work force and created a hostile work environment for the minorities and women.

In January 1992, plaintiff gave a deposition in a state civil rights suit brought against the City by a female probationary firefighter, Mary Potts. In his deposition, plaintiff described several instances of racism within the fire department. In March 1992, plaintiff told a local television reporter that the SFD was sexist and racist. He recounted several incidents that he perceived as evidence of racism in the SFD.

A few days after this television interview, plaintiff agreed to speak with a newspaper reporter. Plaintiff was quoted as saying that the SFD was ignoring racism at the SFD and that the City's minority hiring plan was a "sham". On March 23, 1992, plaintiff wrote a letter to the City Administrator, defendant Robert Block, in which he accused the City of being a "do-nothing" administration and complained that the cadets had become "engine house janitors." Plaintiff sent a copy of the letter to the media.

On April 29, 1992, Director Tobin sent plaintiff a letter of reprimand criticizing plaintiff for his comments to the media. The letter stated that plaintiff's public statements had compromised his ability to perform his job duties and to act as a representative of the City.

On August 27, 1992, plaintiff filed a civil rights action in Oakland County Circuit Court. On that day, plaintiff held a press conference at City Hall. Plaintiff stated that racism existed at the SFD and that he did not believe the SFD wanted to recruit any more minorities.

On September 8, 1992, the City terminated plaintiff's employment. Plaintiff then commenced this action in U.S. District Court, claiming that he was wrongfully terminated in violation of his First Amendment rights and in violation of the WPA and the ELCRA. After the District Court stayed plaintiff's WPA claim, the jury returned a verdict in favor of defendants on plaintiff's claims under the First Amendment and the ELCRA. Following the verdict, the District Court dismissed plaintiff's WPA claim.

II. First Amendment Claim

Plaintiff claims that the District Court improperly instructed the jury on the law as it applies to his First Amendment claim. In its defense against plaintiff's claim, the City contended that plaintiff's speech made it difficult, if not impossible, for him to perform his employment duties. Plaintiff contends that the court should have instructed the jury that it could not base its verdict

on defendants' opinions and speculations as to the disruption plaintiff's speech caused, but should consider only proof of actual harm caused by the speech.

We review jury instructions as a whole to determine whether they "adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision." Beard v. Norwegian Caribbean Lines, 900 F.2d 71, 72 (6th Cir. 1990). A party is not entitled to a new trial based upon alleged errors in the jury instructions unless the instructions, "viewed as a whole, were confusing, misleading, or prejudicial." Id.

For the speech of a public employee to be protected by the First Amendment, (1) the speech must be on a matter of public concern, and (2) the employee's interest in expressing himself or herself must not be outweighed by any injury the speech could cause to the "interest of the State, as an employer, in promoting the efficiency of the public services its performs through its employees". Connick v. Myers, 461 U.S. 138, 142 (1983) (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

Plaintiff claims that the District Court erroneously instructed the jury as to the City's burden of proof in satisfying the second element of this test. The District Court instructed the jury as follows:

> Now, the speech as such, of plaintiff, was on matters of public concern. If the speech of plaintiff interfered with the effectiveness of the City of Southfield's operations, or

> interfered with the performance of plaintiff's job duties, then it was -- it is not protected speech.
>
> In proving its assertion that plaintiff's speech disabled him from performing his job duties, the City, the defendant, must prove by a preponderance of the evidence, that the plaintiff's statements interfered with the effectiveness of the City of Southfield's operations, or in the performance of plaintiff's job.
>
> As to plaintiff's first claim, since his speech dealt with matters of public concern, defendant has the burden of proving, by a preponderance of the evidence, that his speech interfered with the effectiveness of its operations, or interfered with the performance of plaintiff's job.

Plaintiff contends that the jury instructions improperly permitted defendants to defeat a First Amendment claim solely on the basis of the state's opinion and conjecture as to the disruption caused by plaintiff's speech. Plaintiff urges us to adopt a rule requiring a public employer to demonstrate objectively that an employee's speech caused actual harm.

The Supreme Court recently indicated that potential disruption caused by a public employee's speech may be sufficient to outweigh the employee's interest in self-expression. Waters v. Churchill., 114 S.Ct. 1878 (1994) (plurality opinion). In Waters, the Court held that a public employee's speech was not protected by the First Amendment because "the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had." Id, at 1890 (emphasis added). The Court stated that because a government employee may have a strong,

legitimate interest in speaking out on public matters, the government employer "may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." Id. at 1887 (emphasis added).

Waters makes it clear, then, that a government employer need not prove actual disruption, but rather merely the likelihood of disruption. Indeed, the Court stated that it gives substantial deference to "government predictions of harm" even when the danger asserted "is mostly speculative." Id. at 1887 (emphasis added). A government employer is not required "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Connick, 461 U.S. at 152.

We hold, therefore, that the jury was entitled to consider defendants' opinions as to the disruptive effect of plaintiff's speech. Such opinions are relevant and could legitimately form the basis for the jury's verdict. The evidence presented by defendants was sufficient to support a finding that plaintiff's statements interfered with his ability to perform his job. We find no error.[2]

---

[2] Remaining text of opinion omitted.